Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1978

No. 77-1434

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

v.

JAMES T. GRIFFITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Missouri Court of Appeals, St. Louis District

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April 4, 1978

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IN THE

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..... TERM, 1978

No. .....

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

v.

JAMES T. GRIFFITH,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Missouri Court of Appeals, St. Louis District

Petitioner, the St. Louis-San Francisco Railway Company, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Missouri Court of Appeals entered in this proceeding on November 8, 1977 which became the final judgment in this cause by order of the Supreme Court of Missouri dated January 9, 1978, by which order that Court refused to transfer this cause from the Missouri Court of Appeals.

OPINION BELOW

The opinion of the Missouri Court of Appeals, which appears as Appendix "A", attached hereto, is reported at 559 S.W.2d

278, (MA-SL, 1977). A copy of the order of the Missouri Supreme Court denying Petitioner's application to transfer this cause from the Missouri Court of Appeals to that Court is attached hereto and marked Appendix "B".

JURISDICTION

The judgment of the Missouri Court of Appeals was entered on November 8, 1977. It became the final judgment in this case on January 9, 1978 when the Missouri Supreme Court denied Petitioner's application to transfer this cause from the Missouri Court of Appeals to the Missouri Supreme Court. This Petition is filed within ninety days of January 9, 1978. This Court's jurisdiction is invoked under 28 USC § 1257(3).

QUESTION PRESENTED

Missouri Supreme Court Rule 70.02, which mandates the use of only one and the same designated jury instruction (M.A.I. 24.01), for all Federal Employer's Liability Act cases tried in the State Courts of Missouri, fails to provide the jury with proper and sufficient instructions to permit them to apply the law as set forth in the Federal Employer's Liability Act, as construed by Federal decisional law and such rule deprives the parties to a fair trial.

STATUTORY PROVISION

45 U.S.C.A. § 51.

LIABILITY OF COMMON CARRIERS BY RAILROAD, IN INTERSTATE OR FOREIGN COMMERCE, FOR INJURIES TO EMPLOYEES FROM NEGLIGENCE; DEFINITION OF EMPLOYEES.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the bneefits of this chapter.

STATEMENT OF THE CASE

The Respondent in this case, Plaintiff below, is a carman (i.e. a car repairer), for the Petitioner railroad, Defendant below. On April 26, 1971, Respondent while performing his du-

ties as carman for Petitioner in its Springfield, Missouri car shops, was in the process of disassembling, cleaning, and reassembling air brake piston assemblies for railroad cars. During the process of reassembly a part of the brake assembly slipped out of a machine used in the reassembly process and struck Respondent, causing serious injuries to his left eye.

The Respondent pleaded his case under the theory of Res Ipsa Loquitur in the following language:

> "On or about the 26th day of April, 1971, plaintiff, while employed by the defendant in the defendant's Centralized Air Brake Shop in Springfield, Missouri, was required, in the performance of his duties, to reassemble a brake piston and while so engaged was required to utilize a metal reassembly rack and in the course of utilizing said rack and appurtenances was violently and unexpectedly struck by the head of a brake piston projected therefrom, thereby causing plaintiff to sustain the hereinafter described serious and permanent bodily injuries and damages.
>
> Plaintiff states that at the time of the above occurrence, the above rack, appurtenances and equipment were under the exclusive management and control of defendant, its agents and employees, and the above occurrence was such as does not ordinarily happen in the absence of negligence and in the exercise of due care, and defendant, its agents and employees possess superior knowledge or means of information as to the cause thereof, said information and knowledge not being readily accessible to plaintiff." (R 1, 2)

He submitted his case to the jury on Instruction No. 2 (R 330). Instruction No. 2 is the exact wording and form of Missouri Approved Instruction No. 24.01. Respondent's Instruction No. 2 reads as follows:

> "Your verdict must be for the plaintiff if you believe:

> First, defendant failed to provide reasonably safe conditions for work, and
>
> Second, defendant was thereby negligent, and
>
> Third, such negligence directly resulted in whole or in part in injury to plaintiff." (R 330)

Pages 237 and 238 of the Missouri Approved Jury Instructions, which contains Instruction 24.01 and the "Notes on Use" pertaining to it read as follows:

> **"24.01 Verdict Directing—F.E.L.A.—Failure to Provide Safe Place to Work**
>
> Your verdict must be for the plaintiff if you believe:
>
> First, defendant was a common carrier by railroad engaged in interstate commerce, and
>
> Second, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected such commerce, and
>
> Third, defendant failed to provide
>
> a. reasonably safe conditions for work, or
>
> b. reasonably safe appliances, or
>
> c. reasonably safe methods of work, or
>
> d. reasonably adequate help, and
>
> Fourth, defendant in any one or more of the respects submitted in paragraph Third was negligent, and
>
> Fifth, such negligence directly resulted in whole or in part in injury to plaintiff (death of name).
>
> Alternate Third, defendant's employee (characterize negligent conduct; i.e., failed to keep a lookout, etc.)
>
> Alternate Fourth, defendant's employee was negligent.

Notes on Use

1. Describe the political divisions between which the commerce occurs.

2. Paragraphs First and Second will seldom be in issue. Omit those paragraphs if the matters are not in issue.

3. These theories of negligence concern conditions of which the defendant had constructive knowledge.

In the event plaintiff submits some act of negligence, constructive knowledge of which is not chargeable to the railroad, there shall be submitted in addition a paragraph providing 'defendant knew or by using ordinary care should have known of such condition, and that such condition was reasonably likely to cause substantial harm.' This paragraph should be inserted between existing paragraphs, Third and Fourth, and the paragraphs should be renumbered accordingly."

A judgment for Respondent for $150,000.00, on a jury verdict, was entered for Respondent by the trial Court on February 25, 1976.

Under Missouri Supreme Court Rule 70.03 objections to jury instructions are not required at the time of trial. Specific objections are required in the motion for a new trial unless made at trial. Rule 70.03 reads as follows:

"70.03 Objections to Instructions

Counsel need not object to any instruction to be given at the request of any other party or by the court on its own motion or to the refusal of any instructions requested by such party. Specific objections to instructions shall be required in motions for new trial unless made at trial. The making of objections during trial shall not preclude making additional objections to the same or other instructions in

the motion for new trial. No general objection to instructions is required. (Amended May 20, 1964, effective Jan. 1, 1965. Amended Jan. 19, 1973, effective Sept. 1, 1973. Renumbered from Rule 70.02 April 7, 1977, effective Dec. 1, 1977)."

On March 9, 1976, within the fifteen days permitted by Supreme Court Rule, Petitioner filed its motion for a new trial (R 368), and raised specific objections to Instruction No. 2 (R 368, 370, 371). Those specific objections were that the instruction constituted a roving commission to the jury permitting the jury to find Petitioner negligent without specifying to the jury what conditions were claimed by Respondent to be negligent (R 370, 371). Petitioner also raised the specific objection that the instruction because of its vagueness, permitted the jury to disbelieve the personal testimony of Respondent and his witnesses and still find for Respondent even though they might believe the accident did not happen as he claimed (R 371).

On June 4, 1976, the trial Court overruled Petitioner's motion for a new trial (R 373). Petitioner took a timely appeal to the Missouri Court of Appeals, St. Louis District, which Court has exclusive appellate jurisdiction of this matter by Article V, Section 3 of the Missouri Constitution. That Court rendered the opinion which is attached hereto and marked Appendix "A".

Petitioner briefed and argued at length before the Court its specific objections that Instruction No 2 (and therefore, also, M.A.I. 24.01) was a roving commission not specifying the conditions that Respondent claimed were not reasonably safe and that the instruction was so vague that it did not even conform to Respondent's pleaded theory of Res Ipsa Loquitur.

In response to those arguments, as can be seen in Appendix "A", the Missouri Court of Appeals disposes of all issues per-

taining to Instruction No. 2 by simply saying that it is in accordance with the language of M.A.I. 24.01 and that M.A.I. 24.01 is **the** Federal Employer's Liability Act verdict directing instruction to be used in Missouri by authority of Supreme Court Rule 70.02 and that the Court of Appeals doesn't have power to change that rule (See page 2 of the Opinion).

Petitioner filed its timely motion for a rehearing or, in the alternative, to transfer this cause to the Supreme Court of Missouri in the Missouri Court of Appeals. The Court denied Petitioner's motions on December 16, 1977. A copy of the order of the Court is attached hereto and marked Exhibit "C". Thereafter, on December 31, 1977, Petitioner filed in the Missouri Supreme Court its timely application to transfer this cause from the Missouri Court of Appeals. Petitioner's application to transfer was denied by the Missouri Supreme Court on January 9, 1978.

Missouri Supreme Court Rule 70.02 reads as follows:

"70.02 Instructions to Juries

(a) Written Instructions—Giving or Refusing. After a jury has been sworn to try a case but before opening statements the court must read to the jury Missouri Approved Instruction No. 2.01 which will be marked and given to the jury along with the other instructions at the close of the case but will not be reread by the court. Before the case is submitted the court shall call a conference of counsel to consider instructions. Any party may, before the case is submitted, request the court to instruct the jury in writing on the law applicable to the issues. The court may give instructions on its own motion. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. All instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. All instructions shall be read by the court.

(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this Rule shall constitute error, its prejudicial effect to be judicially determined. However, the use of an approved instruction or following notes on use before the effective date shall not be presumed to be error.

(d) Marking—Use of and Filing. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

> 'MAI No. ——' or 'MAI No. —— modified' or 'Not in MAI'

as the case may be. Original instructions which are refused shall be so marked by the court and filed with the clerk. Original instructions which are to be given shall be consecutively numbered and all shall be given as instructions of the court. Except where otherwise provided in Missouri Approved Instructions, they shall be given in such order as the court shall deem advisable. All instructions shall be carried by the jury to their room and returned and filed at the conclusion of their deliberations. All instructions refused and all instructions given, including a record of who tendered them and the 'MAI' notation, shall be kept as a part of the record in the case.

(e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the

issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(f) Instruction Directing Verdict—Converse Instruction. Instructions may be given, authorizing a verdict for a defendant, upon finding the converse of any essential fact or element essential to a verdict for plaintiff. The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed.

(Amended May 20, 1964, effective Jan. 1, 1965; amended Jan. 19, 1973, effective Sept. 1, 1973. Renumbered from Rule 70.01 and amended April 7, 1977, effective Dec. 1, 1977)."

REASON FOR GRANTING THE WRIT

The Writ of Certiorari herein sought should be granted because the Supreme Court of Missouri by its Rule 70.02 and by its action in permitting the Opinion of the Missouri Court of Appeals herein to become law has dictated that M.A.I. 24.01 is *the* only verdict directing instruction to be used in any Federal Employer's Liability Act case in Missouri. In so doing, it has burdened Petitioner and all other Federal Employer's Liability Act defendants in this State with an unfair discriminatory instruction which denies all such defendants their substantial right, accorded under the Federal Employer's Liability Act., to have a jury fairly decide whether they are guilty of the negligence charged against them.

ARGUMENT

1. The Question Presented Is an Important Federal Question Because Petitioner and All Railroad Defendants in Federal Employer's Liability Act Cases in the State of Missouri Are Being Deprived of Substantive Rights Granted Under the Federal Employer's Liability Act by Rule of the Supreme Court of Missouri and by the Opinion of the Missouri Court of Appeals in this Case.

The most basic question in any cause brought under the Federal Employer's Liability Act is whether or not the defendant railroad is negligent in the respects claimed by the plaintiff. What constitutes negligence under the statute is a Federal question, not varying in accordance with the differing conceptions of negligence applicable under State laws. Federal decisional law applying the concept governs, *Urie v. Thompson*, 1949, 337 U.S. 163. The plaintiff has the burden of proving that the railroad was negligent in those respects and the jury must so find before the railroad is liable. In Missouri, the issue of negligence

is submitted to the jury through the use of a form jury instruction, M.A.I. 24.01, required by the Missouri Supreme Court under its Rule 70.02.

By imposing the use of M.A.I. 24.01 as *the* plaintiff's verdict directing instruction in all Federal Employer's Liability Act cases in Missouri, the Supreme Court of Missouri has deprived Petitioner and all other Federal Employer's Liability Act defendants in Missouri of their right to have the jury decide whether or not they are negligent in the respects claimed by plaintiff. Instead the jury is required to be given a general charge which gives them no aid whatsoever in determining what the specific issues of negligence are in a given case or how to resolve those issues. They are given only the legal conclusions set out in M.A.I. 24.01 and *no* factual question is submitted for their resolution. They are *never* required to resolve a factual question. They are *always* merely permitted to agree or disagree with the legal conclusions set out in M.A.I. 24.01. Whether or not the railroad is negligent because of specific conduct or for permitting specific circumstances is not decided. Hence Petitioner submits that the Missouri courts are denying its right to jury adjudication of the question of its negligence under the Federal Employer's Liability Act. This is an important issue because it affects the rights of all Federal Employer's Liability Act defendants in all cases brought under the Act in Missouri.

2. **M.A.I. 24.01 Is an Inadequate Instruction Unfairly Discriminating Against Petitioner and Other Railroad Defendants in the State of Missouri, Depriving Them of Substantive Rights Under the Federal Employer's Liability Act, Solely and Only Because They Are Federal Employer's Liability Act Defendants.**

M.A.I. form instructions were adopted in the State of Missouri in 1965. By Supreme Court Rule 70.02, that Court decreed that the form instruction in the M.A.I. book, if applicable to the case, must be used to the exclusion of all other instructions. M.A.I. 24.01, with one very minor exception pertaining to the Fourth paragraph thereof, has been unchanged since the day it was published. Now, with the instant decision, the Missouri Court of Appeals has taken the ultimate step of requiring M.A.I. 24.01 to be used in all Federal Employer's Liability Act cases no matter what the proof or theories may be. They can do that because M.A.I. 24.01 is so vague and general it includes all possible legal theories and requires no factual hypothesis.

What justification have the Missouri courts given for foisting this incredible instruction on all Federal Employer's Liability Act defendants in all Federal Employer's Liability Act cases? Their reasoning is as astounding as the instruction. It is set out in the case of *Ricketts v. Kansas City Stock Yards*, Mo., 1972, 484 S.W.2d 216. No other justification has been attempted. The only explanation voiced in the *Ricketts* case is that Federal Employer's Liability Act defendants are liable if they are guilty of only "slight negligence", l.c. 221. That it is to say, the railroads are liable under the Federal Employer's Liability Act if they failed to exercise "great care", l.c. 221. Logically, it would seem that resolution of specific factual questions is equally important whether the issue be one of "ordinary care" or "great care".

Further, the Missouri courts' view of Federal Employer's Liability Act negligence, as expressed in *Ricketts*, is wrong. The standard applicable to Federal Employer's Liability Act negligence is the same standard applied in other negligence cases, namely, the failure to exercise the degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances. This Court made that abundantly clear in the case of *Tiller v. Atlantic Coast Line R. Co.*, 1943, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed 610. It is true that the amount of evidence required to make a submissible jury case is small in Federal Employer's Liability Act cases, *Lavender v. Kurn*, 1946, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916. It is also true that any causal connection whatsoever between the

railroad's negligence and plaintiff's injuries will suffice to support a plaintiff's verdict, *Rogers v. Mo. Pac. R. Co.*, 1957, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493. But the standard of care is the same in Federal Employer's Liability Act and non-Federal Employer's Liability Act cases. Hence, even the rationalization of Missouri courts for the propriety of M.A.I. 24.01 is without merit. There is simply no justification for the Missouri courts' discrimination in their instruction practice between Federal Employer's Liability Act and non-Federal Employer's Liability Act cases.

In this connection it must be noted that prior to 1965, before the imposition of form instructions by the Missouri Supreme Court, narrative jury instructions were used, much like the practice in Federal District Courts today. In the narrative instructions in Federal Employer's Liability Act cases the Missouri courts required the jury to decide specific factual issues. Those instructions did not permit the vague general terms of M.A.I. 24.01. In fact clear-cut preciseness was required. This is plainly demonstrated by the case of *Johnson v. Missouri-Kansas-Texas Railroad Company*, Mo., 1960, 334 S.W.2d 41, l.c. 46-47, a case by the same Missouri Judge who wrote *Ricketts*, supra. Likewise, the Federal District Courts submit specific factual issues in their jury instructions. Illustrative cases are *Hite v. Western Maryland Railway*, U.S.C.A., 4th Cir., 1954, 217 F.2d 781, l.c. 782: *Terminal R. Assn. of St. Louis v. Fitzjohn*, U.S.C.A., 8th Cir., 1948, 165 F.2d 473, l.c. 480.

It must be kept in mind that the Missouri Supreme Court has expressly declared that M.A.I. 24.01 is a vague roving commission inadequately defining the jury issues to be decided and has decided that it is an illegal instruction in any except Federal Employer's Liability Act cases, *Ricketts v. Kansas City Stock Yards*, Mo., 1972, supra. That line of reasoning has been followed by the Missouri Court of Appeals on at least one other occasion in the case of *Searcy v. Neal*, MA-KC, 1974, 509 S.W.

2d 755, where M.A.I. 24.01 was again found to be an unfit submission for any except Federal Employer's Liability Act cases.

There is no reason in law or logic requiring the discrimination practiced by the Missouri Supreme Court in its imposition of M.A.I. 24.01 in Federal Employer's Liability Act cases. Apparently its action is based on its misconception of the law as to the standard of care imposed by the Federal Employer's Liability Act. This Court must rectify the situation if Federal Employer's Liability Act defendants are to get fair trials in Missouri. This Court has in the past reviewed State Court cases because of potential instructional error, *Seaboard Air Line Railway v. Padgett*, 1915, 236 U.S. 668, 35 S.Ct. 481, 59 L.Ed. 777. Petitioner respectfully requests the Court to do so in this cause.

3. The Question Presented Here Is One Touching Petitioner's Substantive Rights Under the Federal Employer's Liability Act and Is Not Merely a Matter of State Procedural Law.

Questions touching the form and wording of jury instructions in State Court civil cases ordinarily do not merit the attention of this Court. However, the question in this case arises out of the arbitrary action of the Missouri Supreme Court in applying different instruction standards in Federal Employer's Liability Act cases as opposed to any other civil jury case in the State. The question here goes far beyond mere points of procedure or semantics and strikes at the heart of Petitioner's rights under the Federal Employer's Liability Act, namely, the right to have a jury decision on the question of its negligence. Vague, general, roving commissions to juries are suitable in Federal Employer's Liability Act cases in Missouri, say the Missouri courts, but they are illegal in all other civil cases. Further, say the Missouri courts, this vague general instruction *must* be used to the exclusion of any other in all Federal Employer's Liability Act cases. Nowhere have those courts imposed such an arbitrary, inflexible, and punishing burden except in Federal Employer's Liability Act cases.

The practical effect of the actions taken by the Missouri courts to deny Federal Employer's Liability Act defendants, *and only Federal Employer's Liability Act defendants,* a fair trial. First, M.A.I. 24.01 must be used no matter what issues have been raised by the pleadings. In the instant case, for example, Respondent's sole pleaded theory was the Doctrine of Res Ipsa Loquitur, which his proof supported. Instruction No. 2 (M.A.I. 24.01), which the trial court must by law give, did not submit the pleaded and proven issues. *Dugas v. Kansas City So. Ry.*, 1973, 473 F.2d 821, certiorari denied 414 U.S. 823, 94 S.Ct. 124, 38 L.Ed. 56. Instead it submitted only the legal conclusion of whether Petitioner proved "reasonably safe conditions for work". It did not submit the question of exclusive control by Petitioner of the machine or even whether the occurrence happened because of Petitioner's negligence. So, also, in those cases where particular conditions for work, particular appliances, or particular methods of work are pleaded issues, Petitioner and other Federal Employer's Liability Act defendants are placed in an impossible situation by the vague terms of M.A.I. 24.01. In most cases, as in the instant case, accidents involving railroad workers involve innumerable conditions and strange pieces of equipment most of which are completely unfamiliar to the average juror. Thus, as in this case, adroit and capable Federal Employer's Liability Act plaintiffs' counsel are able to paint a picture of liability involving all of the various circumstances, some of which may be unpleasant, which happen to surround the occurrence, whether they are legitimate issues of negligence or not. The vague conclusions submitted in the instruction make it impossible for Federal Employer's Liability Act defense counsel to focus the attention of the jury on the true factual issues involved. They are not able to confine the case to the issues. Instead the jury is permitted, even invited, to sift through all of the circumstances to find some small detail which they believe "is not a reasonably safe condition". Thus, the "shotgun" approach to the issue of negligence required by M.A.I. 24.01 presents an impossible

situation from the defense viewpoint. In that way, the generality of M.A.I. 24.01, in a real and substantial sense, deprives Petitioner in the instant case, and all other Federal Employer's Liability Act defendants in Missouri, of a fair trial on the merits of those cases brought against them under the Federal Employer's Liability Act.

CONCLUSION

For the foregoing reason, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 4, 1978

Certificate of Service

I hereby certify that three true copies of the foregoing Petition for Writ of Certiorari and Appendices "A," "B" and "C" were hand delivered to the Office of C. Marshall Friedman, Attorney for Respondent, 818 Olive Street, St. Louis, Missouri, by the undersigned this 5th day of April, 1978.

GERALD D. MORRIS

APPENDIX

APPENDIX "A"

In the Missouri Court of Appeals
St. Louis District
Division Three

James T. Griffith,
Plaintiff-Respondent,
v.
St. Louis-San Francisco Railway Company,
Defendant-Appellant.

Cause No. 38,255.

Appeal from the Circuit Court of the City of St. Louis
Hon. Clyde S. Cahill, Jr.

Opinion Filed November 8, 1977

Plaintiff-respondent was injured while working as an employee for defendant-appellant, St. Louis-San Francisco Railway Company. Plaintiff sued defendant under the Federal Employers' Liability Act, 45 U.S.C.A. § 51, and received a $150,000 jury verdict. On appeal, defendant contends that the trial court erred: (1) in giving plaintiff's verdict directing instruction; (2) in refusing defendant's converse instruction; (3) in refusing to admit an exhibit of a recorded recollection of a defense witness; (4) in failing to grant a new trial after an alleged prejudicial statement made by plaintiff's counsel in closing argument; (5) in failing to grant a new trial or remittitur by reason of an alleged grossly excessive verdict. We find no error and affirm the judgment.

Plaintiff was employed by defendant in Springfield, Missouri. At the time of his injury, plaintiff was assembling rebuilt air

brake pistons which were put together under air pressure. As plaintiff was in the process of assembling an air brake piston, a portion of the piston slipped forward and struck plaintiff on the left eyebrow and nose, injuring plaintiff's eye. As a result of the injury, plaintiff suffered permanent impairment and distortion of vision. The jury award was $150,000.

1. Defendant first attacks plaintiff's verdict directing instruction which is based on M.A.I. 24.01 and was submitted as follows:

> "Your verdict must be for plaintiff if you believe:
>
> First, defendant failed to provide reasonably safe conditions for work, and
>
> Second, defendant was thereby negligent, and
>
> Third, such negligence directly resulted in whole or in part in injury to plaintiff."

Although defendant did not object to the foregoing instruction at trial, on appeal, it contends that the verdict director permits an improper roving commission for the jury. Defendant's allegation of error is without merit. The contested instruction has been specifically adopted by our Supreme Court for use in F.E.L.A. cases. See M.A.I. 24.01. As such, its use is mandatory to the exclusion of all others. Rule 70.01(b); Brown v. St. Louis Public Service Co., 421 S.W.2d 255 (Mo. banc 1967).

In Ricketts v. Kansas City Stock Yards Co. of Maine, 484 S.W.2d 216 (Mo. banc 1972), regarding an instruction congruent in every respect to plaintiff's verdict director here,[1] it was said, l.c. 221:

---

[1] Defendant claims that the word "thereby" added to paragraph second of the verdict director and which does not appear in M.A.I. 24.01 renders the instruction fatally defective. The word "thereby" caused no concern to the Supreme Court in *Ricketts* and does not here.

> "This instruction's wording in what it submitted follows M.A.I. 24.01 which is designed for submission of F.E.L.A. cases."

Defendant's request that we abjure Supreme Court rules and, incidentally, *Ricketts*, is futile. We do not have power to do so. We are bound by the Supreme Court's rules and its decisions. Pitts v. Malcolm Bliss Mental Health Center, 521 S.W.2d 501 (Mo. App. 1975); *Ritter v. Lindberg Acoustics, Inc.*, 501 S.W. 2d 207 (Mo. App. 1973). Plaintiff's verdict director is valid, and we are not persuaded to step beyond the bounds of the strictures of our appellate review.

2. Defendant submitted the following purported converse instruction to plaintiff's verdict director:

> "Your verdict must be for the defendant if you do not believe the nonpressure head slipped out of the reassembly rack while the nonpressure head was under air pressure".

The trial court refused the instruction, which defendant complains was error. We find no error. A converse must be in substantially the same language as that used in the verdict director it converses. Oventrop v. Bi-State Development Agency, 521 S.W.2d 488 (Mo. App. 1975); Snyder v. Chicago, Rock Island & Pacific Co., 521 S.W.2d 161 (Mo. App. 1973). Defendant's ostensible converse does not comport with this precept. There was no error in refusing defendant's converse.

3. Defendant argues that it was error for the trial court to refuse to allow one of its witnesses, Loren Tate, to refresh his memory from a written statement he had made shortly after the accident and in refusing to admit the statement into evidence. Mr. Tate was plaintiff's foreman on the date of the accident. He testified as to the condition of the air brake procedures subsequently taken by defendant to prevent further occurrences of the particular accident experienced by plaintiff.

Defendant sought to introduce into evidence a written report prepared by Mr. Tate after the accident stating the corrective measures taken by defendant to avert similar happenings. The alleged purpose of the written statement was to refresh Mr. Tate's recollection as to what had happened on the date of the accident. The fact is that Mr. Tate had already testified clearly and unhesitatingly regarding everything that was contained in the proffered statement. As stated in Watson v. Meredith Development Co., 410 S.W.2d 338, 341 (Mo. App. 1966):

> "Generally speaking, the question of whether a witness may be allowed to refresh his recollection is a matter reposing in the sound discretion of the trial court, reviewable only for abuse. (citations omitted) However, . . . a sound discretion would ordinarily dictate that a witness should not be asked to refresh his recollection unless it is first established that he has no present recollection and that he needs the aid of a memorandum in order to recall the facts to his mind or otherwise establish them."

From the record, it is clear that Mr. Tate needed nothing to refresh his recollection for the substance of his testimony. There was no abuse of discretion in the trial court's refusal to receive the written statement in evidence, Furthermore, where a witness has not been impeached, prior consistent out of court statements, written or oral, are not admissible to bolster his in court testimony. The out of court statement is hearsay and is not admissible under any exception to the hearsay rules.

4. During his closing argument, plaintiff's counsel made a statement conveying the impression that defendant would "get rid of" plaintiff after the case was over. Defendant's counsel objected to the comment, and the objection was sustained. No further relief was requested. Defendant, in its brief states that "[i]t may be argued that the trial court sustained defendant's objection to the argument and that defendant got the relief it requested." We agree. Defendant did get all the relief it requested and is not now in position to complain. State v. Rutherford, 554 S.W.2d 584 (Mo. App. 1977); Burian v. Dickens, 527 S.W.2d 26 (Mo. App. 1975). We find no abuse of discretion in the trial court's failure sua sponte to declare a mistrial nor does any basis exist, as defendant contends, to reverse and remand merely because the statement was made late in the trial during closing argument, which, according to defendant, would make a request for a mistrial futile.

5. Finally, defendant suggests the the jury verdict of $150,000 was overly munificent and demonstrated bias and prejudice. In the alternative, defendant argues that we should order a remittitur.

The evidence disclosed that as a result of being struck in the eye and eyebrow by a portion of the air brake piston on which he was working, plaintiff suffered serious and permanent injury to his eye. There was competent medical testimony that plaintiff's vision would be permanently distorted, not correctable by the use of eye glasses; that his vision was impaired. There was also medical testimony that by reason of the injury sustained the possibility exists that plaintiff's visual problems could be aggravated; that complications such as glaucoma and retinal detachment could ultimately occur with loss of sight of the injured eye. Defendant does not challenge the fact that the plaintiff was injured or that permanent visual distortion did occur as a result of the injury. The jury is vested with broad discretion in affixing the amount of the award as is the trial judge in determining whether to order a remittitur. Blond v. Overesch, 527 S.W.2d 663 (Mo. App. 1975). Gixing consideration to the nature and extent of plaintiff's injuries, their permanence, the plaintiff's age —38 at the time of the injury—consideration of economic factors, awards in other cases and the jury's superior position to appraise the injury, we cannot say that the jury award was excessive or that the trial court abused its discretion in failing to order a remittitur. Bedwell v. Chicago, Milwaukee, St. Paul & Pac.

R.R. Co., 509 S.W.2d 81 (Mo. 1974); McDowell v. Southwestern Bell Tel. Co., 546 S.W.2d 160 (Mo. App. 1976); Strake v. R.J. Reynolds Tobacco Co., 539 S.W.2d 715 (Mo. App. 1976); Woodford v. Illinois Central Gulf Railroad Co., 518 S.W.2d 712 (Mo. App. 1974). Under the circumstances of this case, we do not believe that the fact that the record fails to disclose plaintiff lost work time from his injury is a significant factor for reducing the verdict.

Judgment affirmed.

/s/ GEORGE F. GUNN, JR.
GEORGE F. GUNN, JR.,
Presiding Judge

Harry L. C. Weier, Judge, Concurs.

John J. Kelly, Judge, Concurs.

APPENDIX "B"

No. 60534

In the Supreme Court of Missouri
St. Louis District No. 38255

September Session 1977

James T. Griffith,

Plaintiff-Respondent

vs. Transfer

St. Louis-San Francisco Railway Company,

Defendant-Appellant

Now at this day, on consideration of defendant-appellant's application to transfer the above entitled cause from the St. Louis District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

State of Missouri—SCt.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1977, and on the 9th day of January, 1978, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 9th day of January, 1978.

THOMAS F. SIMON, Clerk
By JANICE B. HANSON, D. C.

APPENDIX "C"

MEMORANDUM

To: Attorneys of Record

From: Robert D. St. Vrain, Clerk
Missouri Court of Appeals
St. Louis District

Re: Motions for Rehearing or Transfer (Rulings)

Date: December 16, 1977

The following motions for rehearing and for transfer to the Supreme Court have been ruled on by the Court.

On November 14, 1977, Appellant's motion for rehearing was stricken as scurrilous. Appellant's motion to transfer denied in the following case:

1. No. 37854 State v. Joe S. Hegwood

On December 16, 1977, Appellant's motion for rehearing or for transfer to Court En Banc or transfer to Supreme Court denied. Judge Reinhard not participating in the following case:

1. No. 38477 James G. Bridges v. Olandrea S. Bridges

On December 16, 1977, Respondent's motion for rehearing granted. Cause reset on Wednesday, February 8, 1978, at 2 p.m. in the following case:

1. No. 38320 State v. Danny Lansford

The following motions for rehearing and/or transfer have all been denied as of today, December 16, 1977:

1. No. 36772 Charlene Sue Faulkner v. James Robert Faulkner
2. No. 36891 Gary Henderson v. Milton S. Yust
3. No. 37036 State v. Paul Albert Wood, Jr.
4. No. 37507 Floyd P. Keller, Sr. v. Winifred Laura Porchey, et al.
5. No. 37761 State v. John C. Daly
6. No. 37879 David Francois v. Lillian M. Jones, Extx, etc., et al.
7. No. 37926 Maralyn Milner v. Texas Discount Gas Co.
8. No. 38070 State v. Terry Woodfin
9. No. 38085 George R. McFarland. et al. v. Louis A. Braddy, et ux.
10. No. 38255 James T. Griffith v. St. Louis-San Francisco RR Co.
11. No. 38301 & 38222 State ex rel. State Highway Commission of Missouri v. Public Water Supply District No. 2 of Jefferson County, Missouri
12. No. 38346 State v. David Hampton
13. No. 38452 In re: Adoption of E.N., et al. v. E.M.N. 38453 H.N. v. E.M.(N)W.
14. No. 38573 State v. Local Junior Joiner
15. No. 38655 Earnest Franklin v. State

16. No. 38674 William J. Vorbeck v. Theodore McNeal, et al., etc.

17. No. 38807 State v. John Payton

18. No. 39250 James Turner, Jr. v. State

RSV/ld

cc: Judges

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1978

No. 77-1434

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

v.

JAMES T. GRIFFITH,
Respondent.

On Petition for Writ of Certiorari
To the Missouri Court of Appeals, St. Louis District

BRIEF FOR RESPONDENT IN OPPOSITION

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May .., 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1978

No. 77-1434

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
Petitioner,

v.

JAMES T. GRIFFITH,
Respondent.

On Petition for Writ of Certiorari
To the Missouri Court of Appeals, St. Louis District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, St. Louis District, (App. A of Petition) affirming the judgment for the Respondent is reported as *James T. Griffith v. St. Louis-San Francisco Railway Company*, 559 S.W.2d 278 (Mo.App. 1977). The order of the Missouri Court of Appeals, St. Louis District, denying Petitioner's motion for rehearing or transfer to the Mis-

souri Supreme Court (App. C of Petition) and the order of the Missouri Supreme Court denying Petitioner's application for transfer to that Court (App. B of Petition) are not reported officially but are noted briefly with the opinion of the Missouri Court of Appeals. 559 S.W. 2d at 278.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under *28 U.S.C. § 1257 (3)*. Respondent specifically denies that jurisdiction is conferred on this Court under *28 U.S.C. § 1257 (3)*. The federal question Petitioner seeks to present herein is not a substantial one and was not presented to or decided by the state courts herein.

QUESTION PRESENTED

Whether *Missouri Supreme Court Rule 70.02, V.A.M.R.*, mandates the use of one and the same designated jury instruction (M.A.I. 24.01) for all Federal Employers' Liability Act cases tried in the state courts of Missouri, regardless of its applicability, and whether, as such, it is in conflict with the Federal Employers' Liability Act. Contrary to Petitioner's assertion in its formulation of the Question Presented, *Missouri Supreme Court Rule 70.02, V.A.M.R.*, requires utilization of a Missouri Approved Instruction (M.A.I.) *only* if it is "*applicable in a particular case.*"

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a fair and concise statement of the facts relevant to the issues herein. In order to avoid repetition, additional relevant facts will be set forth under the appropriate point in the Argument.

ARGUMENT

I

The Writ Should Be Denied Because This Court Has No Jurisdiction to Decide the Question Presented by the Petition for a Writ of Certiorari in That the Question Was Not Properly Presented to, or Passed on by, the State Courts Below.

The Petitioner seeks to invoke the jurisdiction of this Court under *28 U.S.C. § 1257 (3)*. On its face, § 1257 (3) requires that the federal right in question be "specially set up or claimed" in the state proceedings. This Court has no jurisdiction of a case in which the sole federal question presented has "never been raised, preserved or passed upon in the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969).

Stated differently, to sustain this Court's jurisdiction under § 1257 (3), the question presented by the Petition for Writ of Certiorari must have been presented to the state courts in such a way that it was necessarily passed on by the state appellate courts in affirming the judgment below. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66. 90 L.Ed. 3 (1945) (same principle on direct appeal).

The prevailing test as to whether a federal question was sufficiently presented in the state courts to confer jurisdiction on this Court to review that question was stated by this Court in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61. 73 L.Ed. 184 (1928). *Zimmerman* held a federal question must be raised "with fair precision and in due time" in the state courts in order to be reviewed in this Court.

In applying this test, two considerations should be kept in mind. First, in order to present the federal question with "fair precision", the party presenting the question must at least make it clear that *federal*, rather than state law is being relied on. *See, e.g., Bailey v. Anderson*, 326 U.S. 203, 206, 66 S.Ct. 66, 68, 90 L.Ed. 3 (1945); *New York Central & H.R.R. Co. v. New York*, 186 U.S. 269, 22 S.Ct. 916, 46 L.Ed. 1158 (1902).

Secondly, whether the federal question was raised in "due time" is a question normally determined by state procedural rules. *See, e.g., Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962, 8 L.Ed.2d 98 (1962). Thus, a refusal by a state court to consider a federal claim due to a failure to raise it in accordance with state procedural rules constitutes an independent and adequate state procedural ground for decision which will preclude review by this Court so long as the procedural rule serves a legitimate state interest and is not applied in an improper attempt to prevent implementation of federal rights. *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

The question presented by the Petition for Writ of Certiorari filed in this case is whether *Missouri Supreme Court Rule 70.02, V.A.M.R.*, mandates the use of only one and the same designated jury instruction (M.A.I. 24.01) for all Federal Employers' Liability Act cases tried in the state courts of Missouri, regardless of its applicability to a given case, and whether, as Petitioner contends, that as such, it is in conflict with the Federal Employers' Liability Act. While it is clear that Petitioner's contention is contrary to the express provisions of *Missouri Supreme Court Rule 70.02, V.A.M.R.*, and the Missouri decisions thereon, as is more fully set forth in Part II of this brief, it is also clear that the question raised by the Petition for Writ of Certiorari has been raised for the first time in this Court. An examination of the record in this case makes it evident that the issue was not raised with fair precision or in due time in the Missouri courts.

The only issues raised by Petitioner in the trial court with respect to Respondent's verdict directing instruction, which followed M.A.I. 24.01, were set forth in paragraph 11 of its Motion for New Trial, which stated in part as follows (R.370-371):

> "11. The Court erred in giving Instruction No. 2, plaintiff's verdict director, in that said instruction is a roving commission to the jury permitting the jury to find defendant negligent for 'failing to provide reasonably safe conditions for work' without specifying what conditions were at issue. Further, said instruction permits the jury to disbelieve plaintiff's personal testimony and the testimony of his witness as to the condition of the reassembly rack and as to whether defendant had knowledge of that condition as claimed by plaintiff, and did find for plaintiff because defendant made changes in the rack after the accident in an attempt to avoid such accidents in the future which argument was made by plaintiff's counsel."

It is evident that these contentions address themselves solely to issues of state law. They do not even contain a reference to federal law.

Under Missouri law, Petitioner was required to set forth any issue it wished to raise with respect to Respondent's verdict directing instruction in its Motion for New Trial in order to preserve the issue for appellate review. *Missouri Supreme Court Rules 70.03 (then Rule 70.02), 78.07, 84.13 (a), V.A.M.R.* This requirement is consistently adhered to by the Missouri Courts. *See, e.g., Bower v. Hog Builders, Inc.*, 461 S.W.2d 784, 797 (Mo. 1970); *Vinyard v. Vinyard Funeral Home, Inc.*, 435 S.W.2d 392, 395-396 (Mo.App. 1968). This rule is also supported by a clearly legitimate state interest. That interest is in giving the trial court a "last opportunity to correct his [instructional] errors without the delay, expense or hardships of an appeal." *Skelton v. General Candy Co.*, 539 S.W.2d 605, 610 (Mo.App. 1976). Petitioner totally failed to present the

federal issue it seeks to raise in this Court to the trial court either at trial or in its motion for new trial, and thereby failed to preserve the issue for review by the Missouri appellate courts.

Petitioner's failure to present the federal question raised in this Court to the Missouri courts with "fair precision" was repeated in the Missouri Court of Appeals. Petitioner's contentions on appeal were based on the same state law grounds set forth in his Motion for New Trial.

The opinion by the Missouri Court of Appeals demonstrates that it did not decide any question of federal law in ruling on Petitioner's contentions with respect to Respondent's verdict directing instruction. That being the case, it may be properly assumed that no federal question was properly raised, preserved and presented to it. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

This conclusion is underscored by Petitioner's failure to comply with *U. S. Supreme Court Rule 23 (f)*, which requires the statement of the case in the Petition for Writ of Certiorari to specify the precise time and manner of the raising of the federal question in the state court of first instance and the state appellate courts, along with the manner in which the state court passed on the question. A review of Petitioner's statement of the case reveals a manifest failure to comply with the Rule. The reason is simply that Petitioner cannot comply when, as demonstrated above, the federal question presented herein was never raised and preserved in the state courts.

Petitioner utterly failed to present a federal question with fair precision, in due time and in accordance with Missouri procedure in the state courts. The question presented by Petitioner in this Court was not passed on by the state courts. No federal claim was specially set up or claimed by Petitioner. Consequently, this Court has no jurisdiction of the question presented under *28 U.S.C. § 1257 (3)*. *Tacon v. Arizona*, 410 U.S. 351,

93 S.Ct. 998, 35 L.Ed.2d 346 (1973); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1962); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962, 8 L.Ed.2d 98 (1962); *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Edelman v. People of California*, 344 U.S. 357, 73 S.Ct. 293, 97 L.Ed. 387 (1953); *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66, 90 L. Ed. 3 (1945); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573, 89 L.Ed. 812 (1945); *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375, 47 L. Ed. 480 (1903).

The writ should be denied because this Court has no jurisdiction to decide the question presented by the Petition for Writ of Certiorari.

II

The Petition for Writ of Certiorari Presents No Federal Question of Substance. The Question Presented, as Formulated by the Petitioner, Is Based on an Erroneous Interpretation of the Opinion of the Missouri Court of Appeals, Below, and of Missouri Law. Respondent's Verdict Directing Instruction Properly Submitted the Ultimate Issues in This Case and Was Fully Consistent With the Federal Employers' Liability Act.

Petitioner's formulation of the question presented is clearly based upon a drastically erroneous interpretation of both the opinion of the Missouri Court of Appeals, below, and of Missouri law concerning Missouri Approved Instruction generally. Petitioner's contention that a federal question of substance and of general importance is presented by its Petition for Writ of Certiorari assumes and depends on this erroneous interpretation.

An accurate and proper interpretation of the opinion below and Missouri law makes it apparent that no federal question of substance or of general importance is presented by this record.

Petitioner's formulation of the Question Presented assumes that *Missouri Supreme Court Rule 70.02, V.A.M.R.*, "mandates the use of only one and the same designated jury instruction (M.A.I. 24.01), for all Federal Employers' Liability Act cases tried in the State Courts of Missouri." By that formulation of the issue Petitioner seeks to create the impression that the Missouri courts would inflexibly and arbitrarily compel the use of M.A.I. 24.01 in a Federal Employers' Liability Act case where it would be inapplicable and therefore inappropriate. Such is not the holding of the opinion of the Missouri Court of Appeals below, nor is it the law of the State of Missouri.

Missouri Supreme Court Rule 70.02 (b), V.A.M.R., provides:

> "(b) Missouri Approved Instructions Exclude Others. Whenever Missouri Approved Instructions contains an instruction *applicable in a particular case* which the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other on the same subject." (Emphasis supplied)

Missouri Supreme Court Rule 70.02 (e), V.A.M.R., provides:

> "(e) Guide for the Form of Instructions Where MAI Not Used. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts."

Missouri's procedural rules regarding Missouri Approved Instructions (and the form of instruction where no Missouri Approved Instruction is applicable) are supported by a legitimate, if not a compelling, state interest. That interest was set forth by the Missouri Supreme Court in *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255, 257 (Mo. banc 1967), as follows:

> "This court, by its adoption of Missouri Approved Instructions, promulgated precise approved instructions. These had been drafted after much research and great effort on the part of the court's special committee and its able reporter, the late Professor John S. Divilbiss. A preliminary draft was distributed and suggestions were received from the bench and bar before final adoption. *The system was devised to eliminate the old system of complex, detailed and frequently argumentative instructions which caused great difficulty for jurors, lawyers and judges, and resulted in a high percentage of reversals on account of instructions given or refused. The special committee carefully considered the precise words to use in each approved instruction in order to provide simple, concise and understandable instructions.* Directions as to the format to be followed were given to cover those instances where no MAI instruction is provided or where the facts of a case require modification of an MAI instruction. When an MAI instruction is applicable, its use is mandatory." (Emphasis supplied.)

It should be noted that Missouri Approved Instructions were adopted in 1965 and that M.A.I. 24.01, pertaining to Federal Employers' Liability Act cases, has been specifically used in cases to which it is applicable in the Missouri Courts since that time.

It is apparent that use of a Missouri Approved Instruction is required *only* if the instruction is applicable to the particular case. The rule clearly contemplates that cases will arise in which a Missouri Approved Instruction will not fairly submit the issues in a case. Missouri law does not senselessly require a Missouri Approved Instruction in such a case, as Petitioner would have

this Court to believe. Rather, the pattern instruction is to be modified to fairly submit the issues, or, if that is not possible, a new instruction is to be drafted to submit the case according to outlines set forth in the Rules.

Missouri Supreme Court Rule 70.02 (c), V.A.M.R., provides that giving an instruction in violation of the Rule is error and leaves the prejudicial effect of such error to be judicially determined. The Missouri Supreme Court has held that when there is a deviation from an applicable Missouri Approved Instruction which does not require modification to fairly submit the issues in a case, prejudicial error will be presumed unless the proponent of the instruction can clearly demonstrate that no prejudice resulted. *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo.banc 1967).

The foregoing authorities were cited by the Missouri Court of Appeals in affirming the verdict and judgment for Respondent. It is irrational to conclude the Missouri Court of Appeals, while relying on *Missouri Supreme Court Rule 70.02 (then Rule 70.01)* and *Brown*, would simultaneously ignore the clear teachings of those authorities and hold that M.A.I. 24.01 must be given without regard to its applicability to a given case.

It is patently obvious that the Missouri Court of Appeals found M.A.I. 24.01, as set forth in Respondent's verdict directing instruction, to be applicable to this case and that the instruction fairly submitted the issues in the case to the jury.

Careful examination of the Petition for Writ of Certiorari suggests that Petitioner is attempting to create a false issue in this case by attacking a statement made in the opinion in an enirely different case, *Ricketts v. Kansas City Stock Yards Company of Maine*, 484 S.W.2d 216 (Mo. banc 1972).

Apart from the inappropriateness of seeking review of a statement in an entirely different case by review of the instant case,

Petitioner is seeking to raise an illusory issue by suggesting that the jury in the instant case was given an improper standard with which to determine the issue of negligence. In so doing, Petitioner has conveniently neglected to include in its Statement of the Case Instruction No. 3, which clearly instructed the jury on negligence in terms of ordinary care. Instruction 3 provided as follows (R.330):

> "The term 'negligence' as used in these instructions means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances."

Apart from the foregoing, it is a fundamental principle of review of state judgments in this Court that:

> "This Court reviews judgments, not statements in opinions. Herb v. Pitcairn, 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-463, 89 L.Ed. 789; Morrison v. Watson, 154 U.S. 111, 115, 14 S.Ct. 995, 997, 38 L.Ed. 927. See also Williams v. Norris, 12 Wheat. 117, 118, 120, 6 L. Ed. 571."

Black v. Cutter Laboratories, 351 U.S. 292, 297-298, 76 S. Ct. 824, 827, 100 L.Ed. 1188 (1956).

The reason for the foregoing rule is set forth by this Court as follows:

> "Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 125-126. 65 S.Ct. 459, 463. 89 L.Ed. 789 (1945).

The insubstantial nature of Petitioner's contentions is further illustrated by the fact that Petitioner's counsel virtually admitted liability in his closing argument.

> "Ladies and gentlemen, Mr. Griffith's case is not worth $150,000. As you can see, the main issue here between the railroad and Mr. Griffith is amount. That's what this fight in large measure is about." (R. 358)

Instruction No. 2, Respondent's verdict directing instruction, which followed M.A.I. 24.01 and was submitted by the Court, provided as follows (R. 330):

> "Your verdict must be for the plaintiff if you believe:
>
> First, defendant failed to provide reasonably safe conditions for work, and
>
> Second, defendant was thereby negligent, and
>
> Third, such negligence directly resulted in whole or in part in injury to plaintiff."

Under the provisions of the Federal Employers' Liability Act, Petitioner was obligated to fulfill its nondelegable duty to provide plaintiff with a safe place to work, stripped of its common-law defenses and liable if its negligence played any part, however slight, in producing Respondent's injuries. This has come to be known as the Safe-Place-To-Work Doctrine. *45 U.S.C. §51; Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 507-509, 77 S.Ct. 443, 448-450, 1 L.Ed.2d 493, 500 (1957); *Shenker v. Baltimore and Ohio Railroad Company*, 374 U.S. 1, 7, 83 S.Ct. 1667, 1671-1672, 10 L.Ed.2d 709, 714-715 (1963). The overwhelming evidence *admitted at the trial without objection* clearly and unequivocally supported the submission of M.A.I. No. 24.01, Petitioner's failure to provide reasonably safe conditions for work. That evidence can be summarized as follows: Numerous complaints had been made prior to Respondent's injuries about the assembly rack

and the working conditions involved in the assembling of rebuilt air brake pistons (R.21,25,35,37,38,40,51,57,72,74,126, 139,140,304,305,314). There were two such racks in Petitioner's shops prior to this occurrence. One was equipped with a sturdy device, to hold the piston head, and a positive safety device, to insure proper insertion and to prevent the head from flying out during assembly (R.68-71,301,302). The rack which Respondent was working with at the time of his injuries was not equipped with either (R.21-26,30,43,44,57,68-71,131,132). In addition to the deficiencies involving the rack itself, there were other conditions existing in the work area and in the work assignment which were unsafe and which contributed to cause Respondent's injuries. The parts to be assembled by hand were soaked in oil and rust prohibitor. During the assembling oil would squirt all over and run down the machine (R.88). Oil and grease would run all over everything (R.25,40,52,73,74,88,133,134). Petitioner's superintendent admitted that it was messy (R.305,352,353). The oil and grease would have a tendency to cause the piston heads to slip out (R.25,40,52,73,74,305). In addition, Respondent was required to work alone at the assembly rack (R.40). Petitioner's quota system required Respondent to assemble, alone and by hand, one piston approximtely every ten minutes (R.124, 125). He was not provided with goggles or safety glasses (R. 25,26,140,141), and was required to leave the partially assembled piston on the rack under pressure and unattended during the assembly process (R.24,38,40,88). Eighty pounds of continuous air pressure would compress the piston upward 18 to 20 inches, causing the retainer lugs to bend upward (R. 85-88,94,129,135,146). The combination of the above unsafe conditions, oily, slippery and greasy parts, unattended machine with eighty pounds of continuous upward pressure, one man working alone (another man could have held the piston), no positive safety device, no sturdy retainer device and no safety glasses or goggles all contributed to cause Respondent's injuries. *Respondent specifically testified that it was everything*

combined that caused the piston head to come out and strike him (R.94).

The foregoing evidence clearly and unequivocally supported the submission of Petitioner's failure to provide reasonably safe conditions for work (M.A.I. 24.01). All of the foregoing evidence was admitted at trial without objection. Plaintiff's petition was deemed, as a matter of state law, to be amended to conform to the evidence introduced, in that such issues raised by the evidence were tried with the consent of the parties. *Missouri Supreme Court Rule 55.33 (b), V.A.M.R.; Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456, 462 (Mo. banc 1972).

Missouri rules concerning the form of approved instructions are procedural in nature. *Meredith v. Missouri Pacific Railroad Co.*, 467 S.W.2d 79, 82 (Mo. 1971). When, as here, an instruction in a Federal Employers' Liability Act case correctly states the substantive law and is clearly supported by the evidence, the *form* of the instruction is a matter left to state procedural law. When a federal cause of action, such as one under the Federal Employers' Liability Act, is prosecuted in state court, the proceeding is conducted according to the state rules of procedure, *Brown v. Gerdes*, 321 U.S. 178, 189-190, 64 S.Ct. 487, 492-493, 88 L.Ed. 659 (1944) (concurring opinion), unless the state procedural rule is in direct conflict with a substantive aspect of the federal cause of action. *See, e.g., Dice v. Akron C. & Y. RR.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952); *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 36 S.Ct. 595, 60 L.Ed. 961 (1916); *Central Vermont Ry. v. White*, 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433 (1915). As demonstrated above, Respondent's verdict directing instruction correctly states the federal substantive law. Petitioner cannot in good faith contend that it was in any way prejudiced by the utilization of Instruction No. 2 in this case.

CONCLUSION

Petitioner, by its efforts to create an illusory issue, by its erroneous interpretation of the opinion of the Missouri Court of Appeals and Missouri law and by its disregard of the record in this case, seeks to portray the question presented by its Petition for Writ of Certiorari as a substantial federal question of general importance. However, based upon the foregoing considerations, it is apparent that there is no merit to the issues raised by Petitioner and that the writ should be denied for want of a properly preserved substantial federal question. *U.S. Supreme Court Rule 19.1 (a).*

Respectfully submitted,

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